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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 298

C. A. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 173-178)¹ is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 28, 1943 (R. 179). The petition for a writ of certiorari was filed August 27, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

¹ References to the printed Transcript of Record are designated by "R." References to the complete typewritten stenographer's transcript are designated by "Tr."

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions raised by the petition may be summarized as follows:

1. Whether an indictment under Section 35 (A) of the Criminal Code (18 U. S. C. 80) charging presentation of a false claim to the Navy Department of the United States was fatally defective in failing to designate the officer to whom the claim was presented and his authority to approve or pay the claim.
2. Whether there was sufficient evidence to support petitioner's conviction.
3. Whether, in a trial for presenting a false claim against the Government in consequence of substituting inferior fish for the kind billed, it was error to admit, as bearing on the question of intent, testimony that petitioner had paid commissions on other orders to the officer who signed the inspection report for the questioned deliveries.
4. Whether the trial judge was guilty of improper conduct in questioning a government inspector concerning petitioner's endorsement of his note, and in commenting thereon in his charge.
5. Whether it was error to refuse to allow petitioner's counsel to comment on petitioner's failure to take the stand.

STATUTE INVOLVED

Section 35 (A) of the Criminal Code, 52 Stat. 197, 18 U. S. C. 80, provides in pertinent part as follows:

Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent * * * shall be fined not more than \$10,000, or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Virginia on two counts of a five-count indictment (R. 123-125) charging him with violations of Section 35 of the Criminal Code, 18 U. S. C. 80 (R. 114-115). The counts upon which petitioner was convicted charged in substance that on July 31 and September 30, 1941, he knowingly presented to the Navy Department false claims against the Government for fresh chilled Spanish mackerel delivered to the Naval Training Station at Norfolk, Vir-

ginia, whereas, with intent to defraud the United States, petitioner in fact had made deliveries of bonito mackerel in place of Spanish mackerel (R. 124-125).

The evidence in support of the Government's case may be summarized as follows:²

On July 31 and September 30, 1941, petitioner submitted to the Navy Department bills in the amounts of \$1,223.80 and \$3,693.44, respectively, for fresh chilled Spanish mackerel, delivered during the current months, pursuant to Government contracts, to the Naval Training Station at Norfolk, Virginia (R. 142-143, 144-146). Petitioner had in storage at the Tidewater Fish Freezer large quantities of bonito mackerel (R. 155, 159), the wholesale price of which was one to three cents per pound as compared with twelve to twenty cents per pound for Spanish mackerel (R. 142, 149-150). Just prior to each of the questioned deliveries to the Naval Training Station, petitioner withdrew from storage quantities of frozen bonito in excess of the amount of Spanish mackerel billed (R. 155-159). The evidence as to the withdrawals and deliveries to the naval station may be summarized in tabular form as follows (R. 142-146, 154-159; Tr. 88, 91; Gov't Ex. 7, 8, 30-33, 49-54):

² Certain additional evidence supporting the conviction, including the testimony of Johnnie M. Hunt, is referred to in the Argument, *infra*, pp 10, 12, 13.

Date of withdrawal	Freezer lot No.	Pounds with- drawn	Date of delivery to Navy	Pounds delivered
July 15 and 16.....	372.....	4,800	July 17	4,371
Sept. 3.....	372.....	4,400	Sept. 4	3,838
Sept. 10 ¹	372 and 378.....	5,000	Sept. 11	4,471
Sept. 24.....	378.....	5,000	Sept. 25	4,427

Petitioner's books, introduced in his behalf, do not account for the disposition made of the frozen bonito (R. 94, 102-105, 160-161, 162-166). A. P. Hunter; operator of a local transfer company, who hauled the major portion of the fish withdrawn from the freezer (R. 150-151), testified that the fish he picked up at the freezer for petitioner was delivered to the Navy (R. 23-26). Two naval employees testified that they had seen bonito mackerel at the Naval Training Station in 1941, and one identified a load of such fish as coming from petitioner (R. 30-31, 34). When petitioner was told that the Federal Bureau of Investigation had been informed of the thawing of frozen rock and bonito mackerel, he stated that "it looked like his luck to get caught at it, anyway" (R. 38-39).

Petitioner moved in arrest of judgment, attacking the validity of the indictment (Pet. 3, 23),

¹ The typewritten transcript (Tr. 89) and the printed record (R. 158) erroneously indicate that 11 boxes of bonito mackerel (1100 lbs.), of Lot 378, were withdrawn September 19, 1943. As the original exhibit 50 shows, these 11 boxes were included within the withdrawals of September 10.

and also moved for a new trial on the ground of newly discovered evidence (R. 116-123). Both motions were denied (Pet. 3). He was sentenced to serve a prison term of fifteen months and to pay a fine of \$250.00 on each count, the prison sentences to run concurrently (R. 114-115). On appeal to the circuit court of appeals, the conviction was unanimously affirmed (R. 179).

ARGUMENT

1. Petitioner contends (Pet. 4, 20-23) that the indictment is fatally defective in failing to specify the officer to whom the claims were presented and the authority of such officer to approve or pay the claims. Even if correctly decided, both cases upon which petitioner relies, *United States v. Wallace*, 40 Fed. 144 (E. D. S. C.), and *United States v. Christopherson*, 261 Fed. 225 (E. D. Mo.), involved indictments under Section 35 of the Criminal Code as it existed prior to 1918.⁴ The statute (35 Stat. 1095) then provided in pertinent part as follows:

Whoever shall make * * * or present * * * for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States * * *

⁴ Although the *Christopherson* case was decided in 1919, the offense charged was committed in 1917.

The Act of October 23, 1918 (40 Stat. 1015), amended the pertinent portion of the statute to read as follows:

Whoever shall make * * * or present * * * for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, *or any department thereof, or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States * * * [changes indicated by italics].

It is thus evident that, prior to 1918, an indictment under this portion of Sec. 35 was required to charge presentation of a claim to a particular officer but that, since 1918, it may charge presentation (1) to an officer, (2) to a department, or (3) to a corporation in which the United States is a stockholder. This Court so indicated in *United States v. Bowman*, 260 U. S. 94, 101,⁵ stating:

It [the statute] is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval service or *to any department thereof*, or any corporation in which the United

⁵ Although the point at issue herein was not raised in the *Bowman* case, it is significant that the indictment therein charged presentation of the claim to the *Emergency Fleet Corporation*, not to a designated officer. See *United States v. Bowman*, 287 Fed. 588, 590-591 (S. D. N. Y.).

States is a stockholder * * *. [Italics ours.]

Where an indictment purports to charge presentation to an officer, the rulings of the *Wallace* and *Christopherson* cases, *supra*, may still be applicable on the theory that a claim is not presented for payment or approval unless the officer receiving it has authority to approve or pay the claim. But where, as here, the indictment charges presentation of a claim to a department as such, those cases have no application since there is no doubt that an executive department, such as the Navy Department, has authority to approve or pay a claim. The purpose of Section 35 is to prevent persons from cheating the Government (*United States ex rel. Marcus v. Hess*, 317 U. S. 537, 544; *United States v. Bowman*, *supra*) and, if the claim is presented to an agency having power to act, it is of little importance whether one officer or another was the immediate recipient of it. Petitioner admits (Pet. 16) that from the indictment "the issue is made clear." The indictment therefore meets the tests by which its validity must be judged; it informs petitioner of the nature of the offense and bars future prosecution for the same charge. *Glasser v. United States*, 315 U. S. 60, 66; *Hagner v. United States*, 285 U. S. 427, 431; *Bersio v. United States*, 124 F. (2d) 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States v. Goldsmith*, 108 F. (2d) 917,

920-921 (C. C. A. 2), certiorari denied, 309 U. S. 678.⁶

2. Petitioner challenges (Pet. 16-20) the sufficiency of the evidence to support his conviction. Although no witness was able to testify that he actually saw the frozen bonito mackerel which had been withdrawn from the Freezer delivered to the Naval Training Station, the circumstances pointing to the fact that they were so delivered leave no substantial doubt that this was the case. The failure of petitioner's books otherwise to account for the withdrawals of bonito mackerel is convincing proof, in the circumstances, that the fish thus withdrawn was delivered to the Naval Training Station. Petitioner's bookkeeper testified that large quantities of bonito mackerel were shipped on consignment, the re-

⁶ Since the name of the person to whom the claim was presented is not an essential part of the indictment, the district court did not, as petitioner also contends (Pet. 23-25) err in denying petitioner's motion for a bill of particulars in this respect. The granting of such a motion is in the discretion of the trial court and is not subject to review except for abuse of that discretion. *Wong Tai v. United States*, 273 U. S. 77, 82; *Dunlop v. United States*, 165 U. S. 486, 491; *Bedell v. United States*, 78 F. (2d) 358, 362 (C. C. A. 8), certiorari denied, 296 U. S. 628. In addition, petitioner claims prejudice (Pet. 24-25) in that the name of Lieutenant George A. Johnson, as the person who signed the inspection reports, was assertedly not furnished in advance of trial. But that Johnson signed the inspection reports appears from the reports themselves (R. 7), which petitioner's counsel examined about a week before the trial (R. 116).

turns for which would not be recorded until the money was actually received (R. 102-104). The improbability that large shipments would be made without records of any kind and the failure of the witness to name more than one dealer to whom the allegedly large shipments were made (R. 104-105, 164) stamp her testimony as unworthy of credence.

The district court, the jury, and the circuit court of appeals have found the evidence sufficient to establish petitioner's guilt. There is, therefore, no necessity for further review by this Court. *Delaney v. United States*, 263 U. S. 586, 589-590; *United States v. Johnson*, Nos. 4 and 5, last Term, decided June 7, 1943.

3. Petitioner complains (Pet. 5-6, 32-36) of the admission of testimony by Johnnie M. Hunt that he and Lieutenant Johnson, the naval officer who signed the inspection reports for the deliveries of mackerel, had received commissions on other orders placed with petitioner by the Navy (R. 53, 55-57). The judge admitted the testimony as bearing on the question of petitioner's fraudulent intent (R. 53). In his charge to the jury, the court particularly cautioned that the transactions about which Hunt testified were not those involved in the case, and that his testimony was to be considered on the question of intent only if the jury first determined that the acts charged in the indictment had been proved beyond a reasonable doubt (R. 137). At the close of his charge,

the judge, at petitioner's request, reiterated his statement that none of the purchases testified to by Hunt was involved in the indictment, and of his own motion called attention to the fact that Hunt's possible interest in the proceedings was a factor to be considered in determining his credibility (R. 139-140).

Petitioner's objection to the admission of Hunt's testimony is therefore without foundation. The statute specifically makes knowledge of the fraudulent character of the claim, i. e., the intent, a constituent element of the offense. That such intent may be inferred from the act itself does not prevent the Government from proving it by other proper means. *United States v. Fawcett*, 115 F. (2d) 764, 768 (C. C. A. 3). Nor is it necessary that the similar acts tending to establish the requisite intent be absolutely identical with the offense charged in the indictment. *Weiss v. United States*, 122 F. (2d) 675, 689-690 (C. C. A. 5), certiorari denied, 314 U. S. 687. The admission of such testimony lies in the discretion of trial judge. *Glasser v. United States*, 315 U. S. 60, 82. A wide latitude is permitted where questions of fraud are presented. *Hatem v. United States*, 42 F. (2d) 40, 41 (C. C. A. 4), certiorari denied, 282 U. S. 887; *Paine v. United States*, 7 F. (2d) 263, 264 (C. C. A. 9).

The limitation placed by the trial judge on the consideration to be given to Hunt's testimony was in fact more favorable to petitioner than the cir-

cumstances demanded. In proving its case, it was necessary for the Government to impeach its own reports and to overcome the presumption that its officers had performed their duty properly.⁷ The relationship of petitioner to Lieutenant Johnson, who signed the inspection reports, was material in determining the weight to be given to such reports, and therefore a proper circumstance to be presented to the jury. Cf. *Williamson v. United States*, 207 U. S. 425, 451.

That such relevant evidence incidentally disclosed the commission of another crime was, of course, no ground for its exclusion. *Johnson v. United States*, 318 U. S. 189, 195-196, rehearing denied, 318 U. S. 801; *Moore v. United States*, 150 U. S. 57, 61; *Devoe v. United States*, 103 F. (2d) 584, 588 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay v. United States*, 95 F. (2d) 890, 894, (C. C. A. 10), certiorari denied, 304 U. S. 580.⁸

⁷ The reports were clearly subject to impeachment for fraud or mistake. Cf. *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317, 358; *MacKnight v. United States*, 263 Fed. 832, 837 (C. C. A. 1), certiorari denied, 253 U. S. 493; *United States v. Christopherson*, 261 Fed. 225, 229 (E. D. Mo.); see also *Oil Co. v. Van Etten*, 107 U. S. 325, 332.

⁸ The testimony of Mrs. Oliver, to the admission of which petitioner also objects (Pet. 36-37), was wholly proper. Her testimony as to petitioner's daily sales (Tr. 139-142) and as to incidents throwing light on his relations with inspectors Davis and Edwards (Tr. 142, 145-146) was an obvious part of the Government's affirmative case. Her testimony with respect to a conversation with Bloxom, petitioner's employee and a witness for the defense (R. 85-86),

The charge, nevertheless, did not permit the consideration of Hunt's testimony in connection with the validity of the inspection reports.

4. Petitioner complains (Pet. 6, 37-44) of the questions propounded by the trial judge to Davis, the Government inspector who had passed the deliveries of fish and who was a witness for petitioner (R. 60-61). As part of its direct case, the Government had brought out the fact that petitioner had endorsed an \$800 note for Davis (R. 43). When Davis was on the stand, the judge asked him whether he was not embarrassed by the necessity of inspecting his endorser's merchandise (R. 71-72). In his charge to the jury on this aspect of the case, the judge stated (R. 136):

* * * It might be said that it is very doubtful that men in their position of trust and confidence ought ever to permit themselves to be put in a position that might embarrass them in the discharge of their duty. However, it is for you gentlemen to pass upon and determine whether or not any such set of facts and circumstances, if established by the evidence, would be sufficient to impugn and set aside the effect

was admitted in rebuttal solely for the purpose of impeaching Bloxom's credibility (Tr. 285-287, cf. Tr. 250, 282-284). The admission of the latter evidence was within the discretion of the trial court. Cf. *Goldsby v. United States*, 160 U. S. 70, 74; *Cornes v. United States*, 119 F. (2d) 127, 130 (C. C. A. 9).

of the certificates which they issued at the time these shipments of fish were sent down to the Naval Training Station.

This statement petitioner also assigns as error (Pet. 44-46).

The conduct of the trial judge is not open to criticism. A presiding judge has the right to interrogate witnesses for either side. *Glasser v. United States*, 315 U. S. 60, 83; *United States v. Gross*, 103 F. (2d) 11, 13 (C. C. A. 7); *United States v. Breen*, 96 F. (2d) 782, 784 (C. C. A. 2), certiorari denied, 304 U. S. 585; *Kettenbach v. United States*, 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613. In substance, the question asked Davis by the trial judge was the same as that which petitioner's counsel had endeavored to ask on direct examination, and Davis' response—that the favor had no bearing on his inspections—was the one which petitioner's counsel had hoped to elicit (see Pet. 39-40). Moreover, in his charge the court was very careful to instruct the jury that they were the sole judges of the weight and credibility to be given to the testimony of each witness (R. 138). In summarizing the evidence with respect to petitioner's endorsement of the notes for the inspectors, the judge specifically told the jury that it was for them to determine the facts from the evidence and to judge how far the facts proved would affect the inspectors in the discharge of their

duties (R. 136). Clearly, the judge made no attempt to coerce the jury or to infringe upon its province. His comment on the inspector's conduct was therefore entirely proper. *United States v. Murdock*, 290 U. S. 389, 394; *Quercia v. United States*, 289 U. S. 466, 469; *Horning v. District of Columbia*, 254 U. S. 135, 138, 139; *Allis v. United States*, 155 U. S. 117, 123; *Simmons v. United States*, 142 U. S. 148, 155; *United States v. Goldstein*, 120 F. (2d) 485, 491 (C. C. A. 2), affirmed, 316 U. S. 114; *Marino v. United States*, 91 F. (2) 691, 699 (C. C. A. 9), certiorari denied *sub nom*, *Gullo v. United States*, 302 U. S. 764.⁹

5. Petitioner also claims (Pet. 4-5, 26-32) that he was prejudiced by the court's refusal to allow his counsel to comment on his failure to take the stand. The purpose of the request, he states (Pet. 31), was to explain to the jury that petitioner did not wish to answer questions concerning his bribery of the naval commissary officers. On its face, this purpose seems improper, since it would amount to testimony on the part of peti-

⁹ As to the objection that the judge failed to give petitioner's requested instruction on reasonable doubt (Pet. 46), the record supports the holding of the circuit court of appeals (R. 178) that the trial judge had adequately covered the subject in his charge in chief (see R. 130-131). Hence it was not error for him to omit the exact words requested by petitioner. *Sugarman v. United States*, 249 U. S. 182, 185; *Corbett v. United States*, 89 F. (2d) 124, 128 (C. C. A. 8).

tioner's counsel in lieu of his own testimony. And the unpersuasive nature of such a statement is so apparent that it seems evident no prejudice could have resulted from the denial of the request.¹⁰ Petitioner concedes that there is no authority for the granting of his motion. Assuming, *arguendo*, that the power exists, the granting or refusal of such a request is a matter incidental to the course and conduct of the trial to the same extent as rulings on the scope of cross-examination, limitation on the number of witnesses, etc. Questions of this nature are peculiarly within the discretion of the trial judge and his rulings with respect to them are not subject to review except for clear abuse. *Glasser v. United States*, 315 U. S. 60, 83; *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150; *Nardone v. United States*, 308 U. S. 338, 342—

¹⁰ Petitioner was obviously endeavoring, by his request, to magnify into a comment on the accused's failure to take the stand, a tentative ruling by the trial judge that a witness could not testify to petitioner's reputation for honesty unless petitioner intended to take the stand (R. 85)—a ruling which the trial judge subsequently reversed (see R. 92-93, 101). At the time the judge's remark was made, petitioner's counsel considered it of so little importance that he withdrew his question (R. 167-169). In view of this failure to object, and in the light of the strong proof of petitioner's guilt, the incidental remark by the judge presents no ground for reversal. *York v. United States*, 241 Fed. 656, 657 (C. C. A. 9); *Nobile v. United States*, 284 Fed. 253, 255-256 (C. C. A. 3); cf. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 238-239; *Holmgren v. United States*, 217 U. S. 509, 523; *Allis v. United States*, 155 U. S. 117, 122.

343; *District of Columbia v. Clawans*, 300 U. S. 617, 632.¹¹

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

OSCAR A. PROVOST,
ALVIN J. ROCKWELL,
Special Assistants to the Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1943.

¹¹ Petitioner's motion for a new trial (see Pet. 25-26) was properly denied since no newly discovered evidence was disclosed. The supporting affidavit admits that, a week before the trial, petitioner's counsel knew that Johnson had signed the inspection reports (R. 116); the record discloses that counsel had a copy of the testimony given by Johnson at Hunt's court martial (R. 55, 57), and that the prosecutor attempted to explain his failure to call Johnson as a witness but was prevented from doing so on objection by petitioner's counsel (R. 146-147). Petitioner was therefore in no position to urge the failure to call Johnson as grounds for a new trial. Cf. *Johnson v. United States*, 318 U. S. 189, 201. There was obviously no abuse of discretion in the denial of the motion, and there is no question for review by this Court. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 247; *Holt v. United States*, 218 U. S. 245, 251.